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No. 07-1286

IN THE

Supreme Court of the United States

W.R. GRACE & CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The central theme of the Government's opposition brief is that there are two completely separate and distinct definitions of "Asbestos" under the Clean Air Act: the "statutory definition" in 42 U.S.C. § 7412(b), and the "regulatory definition" in 40 C.F.R. § 61.141. Opp. 3. That argument is manifestly incorrect. There is no "statutory definition" of the term "Asbestos" in the Clean Air Act, and the EPA has defined that statutory term by regulation. As the district court recognized, in a justice system that recognizes the rule of lenity, it would be completely anomalous and inappropriate to apply a broader definition of "Asbestos" in a criminal prosecution under the Clean Air Act than the EPA's own definition of that statutory term. Put simply, the Government may not criminally prosecute defendants under the Clean Air Act for releasing substances that the Government itself has excluded from the definition of a hazardous air pollutant under the Clean Air Act. Because, as highlighted by *amici* the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, and the American Chemistry Council, the decision below is both indefensible and enormously destabilizing, this Court's review is warranted.

ARGUMENT

The Government concedes, as it must, that the Clean Air Act's "knowing endangerment" provision, 42 U.S.C. § 7413(c)(5)(A), neither lists nor defines the substances within its scope, but instead cross-references the list of substances subject to regulation by the EPA under § 7412(b). *See* Opp. 15. The Government insists, however, that § 7412(b) defines

the listed substances to the extent it identifies them by reference to numbers assigned to them in a Registry published by a private entity, the Chemical Abstract Service (CAS). *See id.* Under this view, "the straightforward text of the statute" defines the substances listed in § 7412(b) in whatever manner the CAS Registry defines those substances at any given moment in time. *Id.*

With all due respect, that argument is preposterous. Nothing in the text of § 7412(b) purports to define any of the listed substances, or suggests that the CAS Registry definition at any given moment in time is the "statutory definition" of any of those substances. The Government has cited no case in the history of American law, and Grace is aware of none, in which Congress gave a private entity the power to define the scope of a criminal statute.

Indeed, as Grace pointed out in its petition, such a delegation would raise constitutional concerns of the first order. *See* Pet. 14 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 311-12 (1936)). The Government responds that "there is no constitutional problem in Congress's definition of 'asbestos' by reference to the CAS number" because "Congress and federal agencies may adopt commercial standards, like those in the CAS Registry, that are 'accepted and fairly stable.'" Opp. 20 n.8 (quoting *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963)) (in turn quoting *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 240-41 (1925)). But that response is a *non sequitur*. The cases cited by the Government stand only for the unremarkable proposition that a term employed by

Congress or a federal agency is not unconstitutionally vague if it has an accepted meaning. *See National Dairy Prods.*, 372 U.S. at 36; *Small*, 267 U.S. at 240-41. Those cases in no way suggest that Congress or a federal agency may delegate to a private party the authority to define statutory terms (particularly in a statute with criminal applications) at whim.

Perhaps for that reason, not even the Ninth Circuit held that the "statutory definition" of the substances listed in § 7412(b) is the CAS Registry definition at any given moment in time. To the contrary, the Ninth Circuit invoked its *own* definition of "asbestos." After explaining that "[w]hen Congress does not define a term in a statute, we construe that term according to its ordinary, contemporary, common meaning," Pet. App. 16a (internal quotation and brackets omitted), the Ninth Circuit declared that "[i]t is *well known* that asbestos has a *common meaning*; it is a fibrous, non-combustible compound that can be composed of several substances, typically including magnesium," *id.* at 16-17a (emphasis added). The Ninth Circuit asserted that this definition "has been established for decades," although the court's only support for that assertion was a statement by a putative Government expert that "asbestos was first defined in 1920." *Id.* at 17a. To be sure, the Ninth Circuit further stated that this "well known ... common meaning" of "asbestos" was consistent with the CAS definition, *see* Pet. App. 17a, but it is simply not true that "the opinion *clearly relied* on the CAS registry definition." Opp. 15 n.6 (emphasis added). Indeed, if that were so, the Ninth Circuit would have had to

confront the serious constitutional issues presented by the Government's interpretation of the statute.

For good reason, the Government conspicuously declines to defend the Ninth Circuit's "well known ... common meaning" of "asbestos": that definition has no basis whatsoever in either science or law. Indeed, that definition is not even limited to minerals, and would sweep in such everyday substances as talc and fiberglass. The Government does not deny this point, but simply asserts that "whether the statute could in some cases reach" substances such as talc and fiberglass is "a question that is not implicated on the facts alleged in this case." Opp. 15 n.6. If ever there were a tacit admission that a case has gone off the rails, this is it. In a circuit covering nine States in the western third of this Nation, the Government now can prosecute someone for releasing talc into the ambient air.

The Government insists, however, that the definition of "Asbestos" in § 7412(b) has nothing to do with the EPA's definition of "Asbestos" in 40 C.F.R. § 61.141. *See* Opp. 16-18. That is most obviously so, according to the Government, because the EPA's definition of "Asbestos" dates back to the 1970s, whereas Congress did not add the word "Asbestos" to § 7412(b) until 1990. Opp. 17. That argument is disingenuous at best.

Section 7412 has been part of the Clean Air Act since the statute's enactment in 1970, and has always required the EPA to regulate "hazardous air pollutants." *See New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008). Originally, Congress did not specify any hazardous air pollutants, but left it up to the agency to devise the list. *See id.* After almost

twenty years, however, the agency had listed only eight such pollutants. Accordingly, Congress grew impatient, and amended the statute in 1990 by listing almost two hundred hazardous air pollutants, including "Asbestos," that the agency was required to regulate. *See id.*; *see also National Lime Ass'n v. EPA*, 233 F.3d 625, 633-34 (D.C. Cir. 2000).

The key point here, which the Government conveniently omits from its brief, is that "Asbestos" is one of the eight hazardous air pollutants that the EPA has regulated under § 7412 since the 1970s. Thus, the Government's suggestion that the EPA's definition of "Asbestos" has nothing to do with § 7412 because that definition "predated Congress's addition of ["Asbestos"] to the statute by more than fifteen years," Opp. 17, makes no sense. Section 7412 is, and always has been, a statutory source of authority for the EPA to regulate hazardous air pollutants, including asbestos. *See* 40 C.F.R. § 61.141 (citing § 7412 as a source of authority). Far from being independent of the term "Asbestos" in § 7412, the EPA's definition gives meaning to that term.

Indeed, if the Government were correct that the CAS Registry definition of "Asbestos" at any given moment in time is the "statutory definition" of "Asbestos" in § 7412(b), then the EPA's definition would be invalid. Under basic principles of administrative law, after all, an agency has no discretion where "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). Thus, where there is a "statutory definition" of a particular statutory term, an agency may not define that term differently. That simple point refutes the central

theme of both the Government's brief and the decision below that the "regulatory definition" of "Asbestos" is separate and distinct from the "statutory definition" of that term. As a matter of law and logic, there cannot be a "regulatory definition" of a statutory term different than, and unmoored from, a "statutory definition" of that term.

The Government argues, however, that the EPA's definition of "Asbestos" in § 7412(b) is irrelevant here because the Grace operations in Libby were not a regulated *source* of asbestos. *See* Opp. 16-17. That argument misses the point. The issue here is the meaning of the term "Asbestos" in § 7412(b). Needless to say, the EPA's definition of "Asbestos" in § 7412(b) provides the most obvious source of that meaning. Certainly, in a legal regime that still purports to follow the rule of lenity, the Government should not be allowed to prosecute defendants for releasing "Asbestos" under the Clean Air Act when the Government itself has excluded the substances at issue from the definition of "Asbestos" under the Clean Air Act. Whether the EPA has chosen to regulate a particular *source* of "Asbestos" is immaterial; what matters is that individuals and businesses are entitled to rely on the EPA's definition of "Asbestos" in § 7412 in ordering their conduct. And that point is particularly compelling where, as here, Congress itself and every other governmental agency to define asbestos has done so in a way that excludes winchite and richterite (which account for approximately 95% of the amphibole impurities in Libby vermiculite). *See* Pet. 11-12.

The Government tellingly makes no effort to defend the Ninth Circuit's conclusion that the

"knowing endangerment" provision of the Clean Air Act, 42 U.S.C. § 7413(c)(5)(A), "pulls its definitions from a *separate* provision than does the regulatory provision." Pet. App. 19a (emphasis added). Both the knowing endangerment provision and the EPA's regulations draw on the *same* list of hazardous air pollutants in § 7412(b). There is not one "criminal" definition of "Asbestos" and another distinct "regulatory" definition. Indeed, the Government concedes that the Ninth Circuit misunderstood the statutory scheme by characterizing the EPA's regulatory program as "'civil'" in nature, because that "regulatory program may be enforced *either* civilly *or* criminally." Opp. 17 n.7 (emphasis added; quoting Pet. App. 19a). In other words, the Government disavows the very premise of the Ninth Circuit's decision that the Clean Air Act establishes "two oversight structures—a *civil* regulatory structure and a *criminal* enforcement provision—that use different definitions of the term 'asbestos.'" Pet. App. 18a (emphasis added).

The Government also disavows the Ninth Circuit's reliance on "defendants' knowledge of the industrial chemicals field," Pet. App. 17a, as a justification for holding they either knew or should have known of the "well known ... common meaning" of "asbestos" announced by the Ninth Circuit, *id.* at 16-17a. As the Government acknowledges, there is not a shred of evidence to support the Ninth Circuit's assertion that "defendants had actual knowledge in this case of the risks from the fibrous content of the asbestiform minerals in their products" because "[t]hey are all familiar with asbestos." *Id.* at 17a. Rather, there are only "allegations in the indictment about petitioners' knowledge," and "[w]hether the

government can prove petitioners' knowledge of the risks from the fibrous content of asbestiform minerals in their products beyond a reasonable doubt is, of course, plainly a matter for proof at the trial." Opp. 21 & n.10 (internal quotation omitted).

The Government nonetheless tries to dismiss the Ninth Circuit's reasoning with respect to petitioners' alleged knowledge as a mere "passing reference" that "was at most dictum." Opp. 22. But the Ninth Circuit itself treats such reasoning as binding circuit law "regardless of whether it was in some technical sense 'necessary' to our disposition of the case." *Barapind v. Enomoto*, 400 F.3d 744, 750-51 & n.8 (9th Cir. 2005) (*en banc*). Thus, unless reviewed by this Court, the law in nine States in the western third of this Nation is that the rule of lenity does not apply where a criminal indictment makes allegations about a defendant's knowledge, *see* Pet App. 17a—a proposition that not even the Government can or will defend.

The Government, however, insists that this Court's review is unwarranted on the theory that it does not matter whether the term "Asbestos" in § 7412(b) is defined by reference to the CAS Registry definition or the EPA regulatory definition. *See* Opp. 14-15. According to the Government, "even if the [regulatory] definition governed, the asbestiform minerals found in Libby that geologists identify as winchite and richterite would be classified as forms of tremolite or actinolite-tremolite that fall squarely within the ... regulatory definition." *Id.* at 14. That statement is manifestly incorrect, as the Government itself underscored by certifying, in order to take this interlocutory criminal appeal, that the district

court's order excluded evidence that was "a substantial proof of a fact material in the proceeding." 18 U.S.C. § 3731. Because the district court here only excluded evidence relating to releases of minerals that are not covered by the EPA's definition of "Asbestos," *see* Pet. App. 64a, the Government is essentially arguing that its certification was false, and that it was never entitled to appeal in the first place.

In any event, it is all fine and good for "the *government's* expert geologist," Opp. 14 (emphasis added), to opine that winchite and richterite are forms of tremolite or actinolite-tremolite, but that does not make it so. Defendants vigorously dispute that point, and neither the district court nor the Ninth Circuit accepted it. Certainly, the Government cannot avoid this Court's review of the Ninth Circuit's erroneous and open-ended definition of "Asbestos" in § 7412(b) by simply asking this Court to accept on faith that the result here would be the same under the EPA's narrower definition of "Asbestos" in § 7412(b). Indeed, if the Government really believed this argument, then the Government should not care if this Court summarily reversed the Ninth Circuit's decision, since (as noted above) the district court did not exclude any evidence relating to releases of "Asbestos" as defined by the EPA. *See* Pet. App. 64a.

Finally, the Government cannot avoid this Court's review by arguing that this case is in an "interlocutory posture," Opp. 12, and noting that defendants may be acquitted on remand even under the Ninth Circuit's definition of "Asbestos," *see id.* As the Government itself has explained, this Court

often has granted certiorari "in federal criminal cases where a court of appeals has remanded for further proceedings, but where a controlling legal issue that will govern further proceedings warrants the Court's attention." Reply Br. for the U.S. in Support of Pet. for Cert., *United States v. Ressam*, No. 07-455, 2007 WL 4142601, at *7-8 (filed Nov. 20, 2007) (citing cases); *see generally* Eugene Gressman *et al.*, *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007); *Begay v. United States*, 128 S. Ct. 1581 (2008) (deciding criminal case in this posture over the Government's opposition); *Sabri v. United States*, 541 U.S. 600 (2004) (same). Because the Government does not explain how "a full trial record," Opp. 12, would shed any light on the correctness of the Ninth Circuit's definition of "Asbestos," or what "unresolved factual issues" on this score remain for trial, *id.* at 13, there is no reason for this Court to postpone its review until after the Government has put Grace and the six individual defendants through a criminal trial under the Ninth Circuit's erroneous definition.

And the Government's further suggestion that this Court's review of the Ninth Circuit's decision would foster "unnecessary delays in the trial process," Opp. 12, is the epitome of irony. The Government itself delayed the trial by filing this interlocutory appeal in the first place. Having taken that step, the Government cannot now invoke trial delay as a reason to immunize the Ninth Circuit's decision from this Court's review. Indeed, as three Judges of the Ninth Circuit recently noted in yet another interlocutory appeal by the Government arising out of this prosecution, the trial in this case has been delayed by the Government's indict-first-

investigate-later approach. *See United States v. W.R. Grace*, No. 06-30192, __ F.3d __, 2008 WL 2052204, at *23 (9th Cir. May 15, 2008) (*en banc*) (opinion concurring in the judgment) ("The Government's litigation strategy has effectively derailed the criminal trial, while it no doubt continues its search for more witnesses and victims. The trial date remains in limbo, and the defendants' right to a speedy trial has been completely frustrated.").

In the final analysis, the Government is trying to rewrite, not defend, the decision below. The Government does not defend the Ninth Circuit's conclusion that the Clean Air Act establishes "two oversight structures—a civil regulatory structure and a criminal enforcement provision." Pet. App. 18a; *see* Opp. 17 n.7. The Government does not defend the Ninth Circuit's conclusion that "[i]t is well known that asbestos has a common meaning: it is a fibrous, non-combustible compound that can be composed of several substances, typically including magnesium." Pet. App. 16-17a; *see* Opp. 15 & n.6. The Government does not defend the Ninth Circuit's conclusion that "defendants had actual notice in this case of the risks from the fibrous content of the asbestiform minerals in their products." Pet. App. 17a; *see* Opp. 21-22 & n.10. Stripped of these undefended (and indefensible) points, there is really nothing left of the decision below. Because that decision leaves the scope of the Clean Air Act's knowing endangerment provision indeterminate and potentially boundless, and (as *amici* have underscored) deprives individuals and businesses of fair warning about what substances they may and may not release under the Act, this Court should grant review.

CONCLUSION

For the foregoing reasons, this Court should either summarily reverse the decision below or set the case for plenary review.

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Respectfully submitted,

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